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BEFORE THE
SURFACE TRANSPORTATION BOARD

STB DOCKET NO. AB-1071

STEWARTSTOWN RAILROAD COMPANY
ADVERSE ABANDONMENT
IN YORK COUNTY, PENNSYLVANIA

REPLY TO

MOTION TO STRIKE

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1. James Riffin ("Riffin"), a party of record in this proceeding, herewith replies to the Stewartstown Railroad Company's ("**SRC**") and the Estate of George M. Hart's February 1, 2012 "Joint Motion to Strike James Riffin's Sur-Reply of January 25, 2012."

BACKGROUND INFORMATION[1]

2. The Estate of George M. Hart (the "**Estate**"), on July 7, 2011, filed an application ("**Application**") to authorize the abandonment of the entire line of the Stewartstown Railroad Company. The ultimate goal of the Estate was to institute State foreclosure proceedings in order to liquidate the assets of the SRC, so that the Estate could collect the debt owed to the Estate by

[1] More detailed Background Information is provided in Riffin's January 25 Reply to the Joint Opposition. Riffin's January 25, 2012 Reply to Joint Opposition is incorporated by reference herein, as if fully set out herein.

the SRC.[2]

3. On January 18, 2012, Riffin filed a Notice of Intent to Participate as a Party of Record, a Notice of Intent to File an Offer of Financial Assistance ("**OFA**") to Purchase Portions of the Stewartstown Railroad, and a Motion for Protective Order, which contained highly confidential documents.

4. On January 20, 2012, the SRC and the Estate filed a **Joint Opposition** to Riffin's January 18, 2012 filings, wherein they argued that (1) it was too late to file a Notice of Intent to Participate as a Party of Record; (2) there is no regulation permitting the filing of a Notice of Intent to File an OFA in an "Application" proceeding; (3) 49 U.S.C. 10904 (c) **mandates** that OFA's in an Application proceeding **must** be filed within 120 days of when the Application is filed; (4) 49 CFR 1152.27 **(b) (1)** is the controlling regulation; (5) Riffin could not possibly be 'financially responsible,' since he filed a bankruptcy petition more than 2 years ago; (6) Riffin is "ill-suited to undertake an OFA for the purposes of legitimate preservation of rail service anywhere; and (7) Riffin's Motion for a Protective Order should be rejected as moot.

5. On January 25, 2012, Riffin filed his Reply to the January 20, 2012 **Joint Opposition**. In his January 25, 2012 Reply, Riffin exercised his Due Process Right to respond to the baseless

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[2] The SRC executed a mortgage of its assets on January 5, 1996, in order to secure a $289,702 debt the SRC owed George Hart. In 2006, the SRC executed and delivered to Mr. Hart a judgment note in the amount of $352,415, which was entered as a judgment with the Prothonotary of York County. The judgment note entitles Mr. Hart to immediate repayment of the loan amount upon demand, which demand was made on December 12, 2008. George Hart died April 17, 2008. His Will was probated on April 24, 2008. The Executor of Mr. Hart's estate is John Willever. In 2009, the SRC's Board of Directors resolved to pursue the sale of SRC's rail assets. The resolution also stated that **"for all practical purposes [SRC] is insolvent."** The SRC proposed a 5-year repayment arrangement, which the Estate and the sole residuary beneficiary of the Estate (the Bucks County Historical Society) subsequently rejected. September 6, 2011 Estate Rebuttal at 4-5, 18.

allegations in the January 20, 2012 Joint Opposition, which allegations had been raised for the first time in the January 20, 2012 Joint Opposition.

6. On February 1, 2012, the SRC and the Estate filed a Joint **Motion to Strike**, wherein they argued that Riffin's January 25, 2012 Reply should be stricken as a impermissible 'reply to a reply,' and that Riffin's January 25, 2012 Reply "is also of no benefit to the record." Motion to Strike at 4.

ARGUMENT

7. Once again, Riffin poses the question: Is the Estate and the SRC using this proceeding to abuse the STB's jurisdiction? The Estate has made it abundantly clear that its sole goal is to sell the assets of the SRC in order to pay off the debt owed the Estate by the SRC. Riffin has offered to purchase portions of the SRC's assets, for cash, in a timely manner. The Estate has bitterly opposed, twice, the sale of the SRC's assets to Riffin. If the Estate only wants money, who cares who provides the money? If the Estate wants to preserve the Line for rail use, why is the Estate so adamantly opposing the only offer it has received to preserve the Line?

8. The SRC and the Estate rely exclusively on 49 CFR 1104.13(c) to support their Motion to Strike. 49 CFR 1104.13 provides:

> **"1104.13 Replies and motions.**
>
> (a) *Time.* A party may file a **reply** or motion addressed **to any pleading** within 20 days after the pleading is filed with the Board, unless otherwise provided. (Bold added.)
>
> (c) *Reply to a reply.* A reply to a reply is not permitted."

9. The STB's regulations do not define what a "reply" is. Over the years, the STB has adopted a fairly liberal rule when it comes to a 'reply to a reply.' If the 'reply to a reply' provides the STB with material which has not previously been filed, and which may help the STB reach its

decision; then the STB generally admits the 'reply to a reply,' or on occasion, has admitted the 'new evidence' portion of a 'reply to a reply.' If the 'reply' raises new issues, the STB generally permits the other party to respond to those new issues. If the 'reply to a reply' merely repeats what has previously been argued, then the STB generally rejects the 'reply to a reply.'

10. 49 CFR 1104.13 is quite explicit: A party may file a 'reply' to '**any pleading,**' An opposing party then may file a 49 CFR 1104.8 Motion to Strike, arguing that a matter should be stricken on the grounds that it is "redundant, irrelevant, immaterial, impertinent, or scandalous."

11. In this proceeding, the SRC and the Estate **have not argued** that any of Riffin's January 25, 2012 reply is "redundant, irrelevant, immaterial, impertinent, or scandalous." The SRC and the Estate rely solely on 49 CFR 1104.13 (c), which prohibits a 'reply to a reply.'

12. The first question that must be addressed, is whether the SRC's and the Estate's January 20, 2012 Joint Opposition, is an in-artfully disguised 'motion to strike,' or is it in fact a 'reply.' If the January 20 Joint Opposition is in fact a 'motion,' then Riffin has the right to respond to that motion.

13. A 'motion' is the term given to a pleading which asks a tribunal to issue an order. The concluding sentence in the Joint Opposition is telling:

> "... and for all of these reasons, Mr. Riffin's various STB filings of January 18, 2012 **must be rejected or denied as appropriate.**"

14. The January 20 Joint Opposition **did not** offer any facts to rebut the facts presented by Riffin. The Joint Opposition offered a procedural argument as to why Riffin's Notice of Intent to Make an OFA was inappropriate. In support of this argument, the Joint Opposition directed the attention of the STB to 49 CFR 1152.27 (b)(1), which addresses the language of the notice that must appear in the *Federal Register*. Unfortunately for the Joint Opposition, the controlling

regulation is at 49 CFR 1152.27 (c), which permits an OFA to be made "**at any time** after the filing of the abandonment ... application."

15. The January 20 Joint Opposition then asked the STB to issue an order 'rejecting' or 'denying' ['striking'] Riffin's January 18 filings. Since the SRC's and the Estate's January 20 Joint Opposition requested the STB to issue an order, the January 20 Joint Opposition is in fact a 'motion,' to which Riffin has the right to respond.

16. In addition, the January 20 Joint Opposition raised a number of new issues. [Can an OFA be filed greater than 120-days after an Application has been filed, when the STB has not ruled on the Application within 110 days, as required by 49 CFR 1152.26(a)? Can someone who filed for bankruptcy two years prior, be a 'financially responsible' person?] Due Process, and the Administrative Procedure Act, require a party be given a reasonable amount of time to respond to new issues.

17. In construing statutes, all of the provisions in a statute are to be construed so that all of the provisions are in harmony with each other, and all words are to be given effect.

18. 49 U.S.C. 10903 does not stipulate a time by which an application must be ruled on. 49 CFR 1152.26 does provide a schedule in application proceedings. 1152.26 states that an application must be ruled upon by day 110. An OFA must be filed no later than ten days thereafter, or by day 120.

19. 49 U.S.C. 10904 (c) states that an OFA **may** [not 'shall'] be filed "within **4 months**" after an application is filed. Since "4 months" and "120-days" can never be equal (there are no four-consecutive-30-day-months in a year), requiring that OFA's be filed within '120-days' violates the clear dictates of 49 U.S.C. 10904(c). Consequently, the schedule in 49 CFR 1152.26 cannot be strictly construed. Besides, there is no provision for a consequence if the schedule in 49 CFR 1152.26 is not adhered to.

20. 49 CFR 1152.27 (c)(1)(i)(A) states than an offer may be filed **at any time** after the filing of an application. 49 CFR 1152.27(c)(1)(i)(B) states that an OFA must be filed "no later than 10 days after service of the Board decision granting the application."

21. The 1152.26 'schedule' states that an OFA must be filed within 10 days after the decision. 1152.27(c) states that an OFA must be filed within 10 days after the decision. 49 CFR 1152.27 (a) states that a carrier must provide certain stipulated information 'promptly upon request' including the 'minimum purchase price.' 1152.27(c)(1)(ii) states than an OFA must explain the disparity between the offeror's price and the carrier's 'minimum purchase price.' If a carrier has not provided the offeror with the 'minimum purchase price,' it is impossible for the offeror to explain any disparity in price. 1152.27(c)(1)(i)(C) states that the 10-day period to make an OFA may be tolled until such time that the carrier provides the requested information. There is no regulation addressing what happens if the Board does not render a decision by day 110. When all of these provisions are read together, to be harmonized, and to give effect to all words, the time for submitting an OFA must be construed to be within 10 days after the Board makes its decision, regardless of whether the Board makes its decision before day 110, on day 110, or after day 110.

22. In addition, since within 10 days after the Board makes its decision, the Board must be notified of any OFA filed before the Board makes its decision, any OFA filed before the Board makes its decision, is of no effect without additional action after the Board makes its decision. It is the action **after** the Board makes its decision that is controlling.

BENEFIT TO RECORD

23. The ultimate question is whether the information provided to the Board in Riffin's January 25 Reply to the Joint Opposition, may help the Board in reaching its decision, and whether Riffin's January 25 Reply will unduly delay the abandonment proceeding. If Riffin's information is not relevant, then it may be stricken pursuant to 49 CFR 1104. If it is relevant, then it should be included in the record. As for delay, it should be noted that the Board did not

render its decision by day 110. The delay in rendering a decision in this proceeding obviously was not due to any filings by Riffin, since day 110 passed before Riffin submitted his filings. Any subsequent delay is solely due to SRC's and the Estate's unwarranted opposition to an OFA being filed by Riffin. It should also be noted that the opposition has not been due to the contents of Riffin's OFA. The opposition has been solely due to the person who filed the OFA.

24. Riffin would argue that the Estate's opposition should be stricken as being irrelevant, since it is irrelevant who provides the Estate with the money that the Estate seeks.

25. The Estate raised many issues in its Rebuttal, including the status of the Northern Central, and the potential for freight rail traffic. Riffin's Reply provided the Board with considerable information regarding the Northern Central, and provided the Board with confidential information addressing the issue of the potential for rail freight traffic, thereby 'filling in the gaps' raised by the Estate.

26. Riffin raised the issue of Pennsylvania's Sediment Control regulations because the Estate failed to address this issue in its Environmental Report, and because the Board's Section of Environmental Analysis failed to address this issue in its Environmental Assessment (even though the Board and the Section of Environmental Analysis are acutely aware of Pennsylvania's Sediment Control Regulations, having made the abandonment in two other Pennsylvania abandonment proceedings subject to Pennsylvania's Sediment Control regulations. See, for example, AB 167 (Sub No. 1191X), Served January 30, 2012 (a Conrail line in Philadelphia), and AB 290 (Sub. No. 328X), Served January 31, 2012, (a Norfolk Southern line in Marietta County, PA) which contain letters from Pennsylvania's Water Quality agency and Region III of the EPA.)

27. Pennsylvania's Sediment Control regulations were important enough 'new evidence' to warrant 're-opening' the AB 290 (Sub. No. 328X) proceeding to impose a condition requiring consultation with Pennsylvania's Bureau of Water Quality.

28. I certify under the penalties of perjury, based on my personal knowledge, the above is true and correct.

Respectfully submitted,

Executed on February 8, 2012.

James Riffin
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CERTIFICATE OF SERVICE

I hereby certify that on the 8th day of February, 2012, a copy of the foregoing Reply to Motion to Strike, was served by first class mail, postage prepaid, upon Alex Snyder, Barley Snyder, P.O. Box 15012, York, PA 17405-7012 and upon Keith G. O'Brien, Baker and Miller, Ste 300, 2401 Pennsylvania Ave, Washington, DC 20037.

James Riffin